

The Status of Vaccination Mandate Laws: What Is Being Enforced?

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The status of the three federal vaccination mandates has waffled, but there appears to be some stability, at least for now. In short, the CMS Rule is being enforced nationwide and the OSHA emergency temporary standard and federal contractor mandate are not. This alert explains the status of each law.

OSHA Emergency Temporary Standard (ETS)

The ETS issued by the Occupational Safety and Health Administration (OSHA) has been stayed by the Supreme Court and employers subject to that mandate do not currently have to comply. The ETS had required employers with 100 or more employees to mandate vaccinations or require weekly testing and masks. The Supreme Court held that the challengers to the ETS showed a substantial likelihood that they would be able to show that OSHA exceeded its authority in issuing the ETS, expressing concern that OSHA is charged with the authority to set workplace safety standards, not regulate public health more broadly, and COVID exists inside and outside the workplace. OSHA can continue to litigate the legitimacy of the ETS through the courts.

Centers for Medicare & Medicaid Services Rule (CMS Rule)

The CMS Rule is narrower than the ETS. The CMS Rule requires employee vaccinations at health care facilities, including hospitals and nursing homes, that receive Medicare or Medicaid funds. Unlike the ETS, the CMS Rule provides no testing and masking alternative, but qualified employees are entitled to accommodations for disability or religion. The CMS Rule was upheld by the Supreme Court and is now in effect nationwide. The majority determined CMS exercised power expressly

authorized by Congress, and there were no grounds “for limiting the exercise of authorities the agency has long been recognized to have.”

Federal Contractor Mandate

The federal contractor mandate is currently on a nationwide stay by trial courts. Courts of appeal, like the Eleventh Circuit, have refused to lift the stay pending appeal. As a result, the Office of Federal Contract Compliance Programs is not enforcing it. The federal contractor mandate was the only vaccine mandate not before the Supreme Court.

By executive order, the Biden administration required the Safer Federal Workforce Task Force to issue guidance to covered federal contractors to ensure their employees are vaccinated and that “all individuals, including covered contractor employees and visitors, comply with published CDC guidance for masking and physical distancing at a covered contractor workplace.” There is no test and mask alternative to vaccination, but qualified individuals are entitled to accommodations based on disability or religion.

State Laws

Some jurisdictions, such as Florida and Montana, have enacted laws to protect employees from certain employer actions surrounding employer vaccination programs. Be sure to check with your employment counsel for advice on conflicts with state or local laws.

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